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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 72-5183

ROGER BENJAMIN DODSON,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

ROGER W. SUNLEAF,
Peoples Savings Bank Bldg.,
Montezuma, Iowa 50171,
Counsel for Petitioner.

August 2, 1972.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

The Petitioner, Roger Benjamin Dodson, respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the Supreme Court of Iowa, the final decision in this proceeding being entered on May 8, 1972.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Iowa delivered on March 16, 1972, is reported at 195 NW 2d 684 and is printed in Appendix A hereto. Upon petition for rehearing by the Petitioner, the Iowa Supreme Court entered an Order denying such rehearing on May 8, 1972. A copy of this order is printed in Appendix B hereto.

JURISDICTION.

The Judgment of the Supreme Court of Iowa was entered on March 16, 1972, with rehearing denied on May 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED.

Does a search warrant authorizing the search of an entire residence not owned by a suspect comport with probable cause requirements when no foundation exists to suspect that the residence contains an illegal item?

STATEMENT OF THE CASE.

On November 27, 1970, Bill Peters, Chief of Police, Grinnell, Iowa, appeared before Justice of the Peace Edwin Lincoln and filed an Information for Search Warrant. Subsequently he secured a search warrant to search "Ben Dodson person and residence of Homer Dodson's residence located at 1516 7th Ave., Grinnell, Poweshiek County, Iowa." The subject of the search was Lysergic Acid (LSD). Although the Justice of the Peace examined both Chief Peters and a confidential informant under oath, the only information he obtained and considered was contained in writing on the Information for Search Warrant and the affidavit attached thereto. The Information and affidavit are printed in Appendix C hereto.

The person of Roger Benjamin Dodson, commonly known as Ben, was searched at the Grinnell Police Department and nothing was found. Two officers then proceeded to the Homer Dodson residence, presented the warrant and began searching in a room they were told was occupied by the petitioner herein. During the search Lysergic Acid was found in a suitcase located in the room. The search warrant is printed in Appendix D hereto.

The affidavit attached to the Information for Search Warrant states only that the confidential informant gave the Petitioner a ride, and that he was told by the petitioner and another that they had purchased Lysergic Acid.

The Petitioner objected to the evidence obtained as a result of the execution of the warrant during trial in District Court. The objections were over ruled and the evidence admitted. Petitioner was convicted of possession of an hallucinogenic drug and sentenced to the State Reformatory.

The opinion and judgment affirming the District Court was filed by the Supreme Court of Iowa March 16, 1972. A subsequent Petition for Rehearing filed by Petitioner was denied on May 8, 1972.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Ruling Decisions of This Court.

In passing on the validity of a search warrant, the reviewing Court may consider only information brought to the issuing magistrates attention. *Giordenello* v. *United States,* 78 S. Ct. 1245, 357 U.S. 480, 2 L. Ed 2d 1503. The only information considered by the magistrate in the instant case is contained in written form on the application for search warrant or the exhibit attached thereto. See Appendix C hereto. In essence, the exhibit and the application only set out the fact that an unidentified informant gave the petitioner a ride from Phoenix, Arizona, to Grinnell, Iowa, and that he was told by the petitioner and another that they had purchased LSD. There is no statement or information as to the time, date or reason the illegal item would be located at "residence of Homer Dodson's residence." There is no showing that Ben Dodson lived with Homer Dodson or had access to a room in that house. Further there is no showing to connect Homer Dodson with illegal drugs.

The Fourth Amendment to the United States Constitution provides that before a warrant can be issued it must particularly describe the place to be searched and sufficient probable cause be shown as to why that place be searched.

The purpose of the application for a search warrant is to allow the issuing magistrate to determine whether the "probable cause" necessary to support a warrant actually exists. *Giordenello* v. *United States, Supra.* It is inconceivalbe that the magistrate in this case could find "probable cause" to issue a search warrant against the "residence of Homer Dodson's residence." The only mention of Homer Dodson in either the application for the search warrant and the warrant itself is in the caption.

Beyond the question of the inadequate description of the house to be searched is the question of time which is also an integral part of probable cause. The information upon which the search warrant in *Aguilar* v. *State of Texas*, 84 S. Ct. 1509, 378 U. S. 108, 12 L. Ed. 2d 723, was based on, and which was struck down by this Court, contains a much more detailed statement of time. In *Aguilar* the officers received information on January 1, kept the premises under surveillance for about a week and on January 8 applied for the warrant.

The *Aguilar* tests were designed to implement the long-standing principal that probable cause must be determined by a "neutral and detached magistrate" and not "by the officer engaged in the often competitive enterprise of ferreting out crime." *Spinelli* v. *United States*, 89 S. Ct. 584, 393 U. S. 410, 21 L. Ed. 2d 637.

In the instant case the only statement as to time was that a companion of petitioner sold a shotgun on November 12 and that some of the money was used to purchase LSD. The application for the warrant was made on November 27, fifteen days after the sale of the gun and against the residence of a person completely foreign to these circumstances.

This Court in *Rugendorf* v. *United States*, 84 S. Ct. 825, 376 U. S. 528, 11 L. Ed. 2d 887, sustained a warrant applied for March 22 on information most recently received on March 16. This case is easily distinguished because the subject of the warrant was stolen property which could not easily be moved.

The affidavit for search warrant in *United States* v. *Ventresca*, 85 S. Ct. 741, 380 U. S. 102, 13 L. Ed. 2d 684, was sustained, but it was a detailed affidavit as to activity observed, the last observation having been made only one day before the application.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment to opinion of the Supreme Court of Iowa.

Respectfully submitted,

ROGER W. SUNLEAF
Peoples Savings Bank Bldg.
Montezuma, Iowa
Counsel for Petitioner

July , 1972.

APPENDIX A.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Appellee,

v.

ROGER BENHAMIN DODSON,
Appellant.

Filed March 16, 1972

14
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Appeal from Poweshiek District Court–*Harold J. Fleck*, Judge

Defendant was charged with unlawful possession of LSD, found guilty and sentenced. He appeals challenging evidential use of the search warrant seized drug.–Affirmed.

Roger W. Sunleaf, of McNeil, Bonham & Sunleaf, of Montezuma, for appellant.

Richard C. Turner, Attorney General, James W. Hughes, Michael J. Laughlin, and Larry Seuferer, Assistant Attorneys General, and Richard J. Vogel, County Attorney, for appellee.

RAWLINGS, J.

Defendant, Roger Benjamin (Ben) Dodson, was charged with unlawful possession of drugs (LSD). His pretrial suppression motion and objections to introduction in evidence of material seized under search warrant were all overruled. Trial jury returned a guilty verdict. Motions in arrest of judgment and for new trial were overruled. From sentence entered Dodson appeals. We affirm.

November 27, 1970, an unidentified informant told Grinnell Police Chief C. W. Peters that Dodson possessed LSD (D-lysergic Acid Diethylamide). The same day, while Peters was in process of securing a warrant for search of Dodson's person and residence, Dodson, of his own volition, entered the police station to visit Gerald Baustian, Jr., there incarcerated.

Upon issuance of the warrant Peters searched Dodson. Nothing was found. Peters then informed Dodson regarding issuance of warrant for search of his residence and asked if he wanted to go along. Dodson acquiesced.

Peters and Police Sergeant Donald C. Ellis, accompanied by Dodson, then went to the latter's home. There the warrant was presented to Homer Dodson, defendant's father, who showed them to his son's room. Upon entering Peters there saw a suitcase in plain sight near the bed. When queried as to what was in the locked suitcase Dodson replied, "Nothing, I don't have the keys to it." Peters and Ellis continued the search, mentioning several times Dodson had better get the keys. After approximately twenty minutes Dodson asked Peters, "You people want to get serious now?" To this Peters replied affirmatively. They then discussed Dodson's personal problems. In course of this conversation Dodson made inquiry and was advised as to the penalty for possession of drugs. He then took a key from his pocket, opened the suitcase, and handed Peters two sheets of paper which appeared to have tabs of LSD on them. Dodson was immediately arrested and given a Miranda warning. Subsequent laboratory examination confirmed presence of the drug.

January 11, 1970, Dodson was charged by information with the instant offense. By pretrial motion to suppress he sought to exclude from evidence the material discovered in the search of his residence. As aforesaid, this motion and his timely trial objectives to evidential use of the drug were in each instance overruled. The search seized LSD and testimony regarding attendant circumstances were accordingly introduced in evidence, and a guilty verdict returned by jury.

The fundamental issue to be resolved is whether trial court erred in so permitting introduction of the search seized LSD.

I.

By his first assignment of error Dodson contends the controverted evidence was discovered in course of a constitutionally impermissible search. This position is foundationed upon claimed absence of adequate probable cause for issuance of the warrant. In support thereof Dodson argues a finding of probable cause cannot be premised upon hearsay statements of an unidentified informant.

In light of relatively recent United States Supreme Court pronouncements in *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723, we find the foregoing contention untenable. There the court held, in substance, a search warrant may issue upon hearsay supplied by an unidentified informant provided there is a substantial basis properly shown for crediting the hearsay, such as personal observations by informant and personal knowledge of affiant as to prior events. See also *State* v. *Salazar*, 174 N.W.2d 453, 456-457 (Iowa); *State* v. *Spier*, 173 N.W.2d 854, 859 (Iowa); *State* v. *Lampson*, 260 Iowa 806, 810-815, 149 N.W.2d 116.

II.

Next to be determined is whether the instantly involved search warrant application contained a factual foundation sufficient to permit independent evaluation by the issuing magistrate of the underlying facts and circumstances from which affiant concluded his informant was reliable.

The warrant was issued by Justice of the Peace Edwin Lincoln, upon application made by Peters. His verified supportive affidavit stated, in substance: Peters had received information November 27, 1970, from a reliable informant who had given truthful information in the past. Informant stated Gerald

Baustian, Jr. had stolen a shotgun from a pickup truck in Grinnell, Iowa, and sold it in Phoenix, Arizona. A check with the Phoenix Police verified Baustian's sale of a gun in Phoenix which exactly matched one previously reported so stolen from a Grinnell resident, Clark Weaver. Informant further stated he had given Baustian and Dodson a ride from Phoenix to Grinnell. During this trip Dodson and Baustian told informant they had purchased several hundred tabs of LSD. Peters was also advised by informant that Baustian and Dodson presently had LSD in their possession and he could obtain some from Baustian. Peters, after searching informant and finding no LSD on his person, sent him to Baustian's residence to procure LSD. Informant was observed entering the Baustian residence, and upon leaving produced four tabs of LSD. Baustian was arrested and found to possess LSD. The affidavit then concluded, "Based on the information of my informant, it is believed that LSD is now located at the residence of Gerald Baustian, Jr. and on the person of residence of Ben Dodson." This sufficed.

III.

In a second assignment of error defendant contends the search seized LSD was discovered as the result of custodial interrogation absent Miranda warnings and is therefore inadmissible. Stated otherwise, he contends his voluntary presence during execution of the search warrant constituted custody which, absent Miranda warnings, vitiated any attendant statements or admissions made by him.

It is, of course, understood inculpatory and exculpatory statements obtained as the result of custodial interrogation absent Miranda warnings, are inadmissible as substantive prosecutory evidence if timely and appropriately challenged. *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R. 3d 974. See also *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28L.Ed.2d 1.

On the other hand, as stated in Miranda, *supra*, 384 U.S. at 478, 86 S.Ct. at 1630: "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *** Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." But that is not instantly determinative.

The officers were here lawfully acting within the scope of the search warrant and pursuant thereto were clothed with authority to forcibly open and effect a search of the suitcase had such been necessary. But this was obviated when Dodson, of his own volition, produced the key, opened the suitcase and handed the warrant designated LSD to officer Peters. Thus there was here no tainted elicitation of incriminatory statements or conduct in connection with the exercise of the warrant based search.

Under these circumstances we find no merit in the assignment of error last above set forth.

Out review disclosed no basis upon which to hold trial court erred in admitting the search seized drug.

AFFIRMED.

All Justices concur.

APPENDIX B.

IN THE SUPREME COURT OF THE STATE OF IOWA

BE IT REMEMBERED, That on the 8th day of May, 1972, the following proceedings were had, to-wit: Petition for Rehearing.

Appeal from Poweshiek District Court.

STATE OF IOWA
VS.
ROGER BENJAMIN DODSON

ORDER:

Appellants petition for rehearing filed in the above entitled appeal has been considered by the court and is hereby denied.

DONE this 8th day of May, 1972.

THE SUPREME COURT

/s/ C. Edwin Moore
Chief Justice

I hereby certify that the foregoing is a full, true and complete copy of the order made by said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines,

this 9th day

of May A.D. 1972

_____ CLERK.

_____ DEPUTY.

(Second page of Exhibit "A" attached to Information for Search Warrant)

Dept. of | POLICE

Grinnell, Iowa

Exhibit A

100% Membership

100% Membership

November 27, 1970

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CLERK OF DISTRICT COURT

Affidavit Continued

had just obtained from Gerald Baustian Jr. I tested the substance and determined by a Val-Tox test that this substance was LSD (Lysergic acid). I state I arrested Gerald Baustian Jr, searched his person as the result of the arrest of larceny in the night time. I found upon his person eight tabs of LSD. I tested a sample by means of a Val tox Test and determined that it was LSD (Lysergic Acid).

Based on the information of my informant, it is believed that LSD is now located at the residence of Gerald Baustian Jr and on the person or residence of Ben Dodson.

Signed C W Peters

Sworn to before me in my presence by said C. W. Peters on this 27 day of November, 1970.

Edwin Lincoln
Justice of Peace
Grinnell Twp

2.02 P. M - 11-27-70

(First page of Exhibit "A" attached to Information for Search Warrant)

Dept. of POLICE

Grinnell, Iowa

Exhibit A

100% Membership

100% Membership

November 27, 1970

Affadavit

TO WHOM IT MAY CONCERN:

I, C. W. Peters, Chief of Police, Grinnell, Iowa, State that I have received information from a informant, who has given me reliable information in the past. The informant has given information in the past, reference breakins and state that the information given to me in the past has proven to be true.

The above mentioned informant advised me, this date, that a Gerald Baustian Jr, stole a shotgun out a pickup truck. The informant stated to me the shotgun was sold to a pawn shop in Phoenix, Arizona.

My department received a complaint from Clark Weaver RR 2 Grinnell stating that a Winchester Model 50 automatic 22 gauge shotgun had been stolen from his pickup truck while it was parked in front of the Loitzing alley in Grinnell on November 9, 1970. He identifies the shotgun as having a plaster toned type nail inserted in the stock under the butt plate for the purpose of securing the ejecter rod.

At my request, the Phoenix police department did check with the Shooters Haven Pawn Shop at 1938 east McDowell in Phoenix Arizona. A shotgun was sold by Gerald Baustian Jr on November 12, 1970, who listed his address at RR4, Grinnell, Iowa. The Phoenix police department did remove the butt plate of the previously described shotgun and did find a plaster toned type nail inserted in the stock used to secure the ejecter rod.

The informant further stated that he gave to Benajamin Dodson and Gerald Baustian Jr a ride from Phoenix Arizona to Grinnell Iowa. The informant stated that he was told by Ben Dodson and Gerald Baustian Jr that the had purchased several hundred tabs of LSD. Some of the money used to purchase LSD was obtained from the sale of the previously mentioned shotgun. The informant further stated that these tabs of LSD are in the possession, at this time, of Gerald Baustian Jr and Ben Dodson.

The informant stated he could obtain some LSD from Gerald Baustian Jr. I state I searched the informant person and vehicle and determined he did not have any LSD in his possession. I state that on this date I followed the informant to the residence of Gerald Baustian Jr. I observe the informant leave the residence with Gerald Baustian Jr and I further state the informant returned to the Grinnell Police Dept with four tabs of LSD which he stated he

213 33-56-273

(Miscellaneous Information & Notes from page two of Information For Search Warrant)

2

MISCELLANEOUS INFORMATION & NOTES

Information from a person I believe to be a reliable informant. Reliable information received from this informant on 2 or 3 previous occasions Identified Gerald Bautista Jr. on an information charging larceny in the nighttime and on a search of the person found & take white & Val Tox tablets alleged to be (L. & D.) Lysergic acid. This would appear to substantiate sufficient evidence to issue a search warrant for the aforesaid premises

NOTICE

THE SEARCH WARRANT MUST BE RETURNED TO MAGISTRATE IMMEDIATELY WITH INVENTORY OF ITEMS SEIZED AND HE MUST SET FOR HEARING WITHIN 48 HOURS OF THE RETURN.

(Front page of Information For Search Warrant)

Official Form Approved by Iowa County Attorney's Association Form Committee, June 1958 — Form 888—CA-184

IN THE MAGISTRATE COURT OF Linn E. Lincoln

IN AND FOR Poweshiek COUNTY, IOWA

STATE OF IOWA, Plaintiff,
vs.
Ben Dodson person and residence of Homer Dodson's residence located at 2526 7th Ave., Grinnell, Poweshiek County, Iowa Defendant

INFORMATION FOR SEARCH WARRANT

STATE OF IOWA, COUNTY OF Poweshiek ss:

(1) I C. W. Peters, being first duly sworn on oath states that I am a credible resident of Poweshiek County, Iowa, that I have good reason and probable cause to believe and do believe, that certain personal property described as follows:

(2) Lysergic Acid (LSD)

State's Ex. ——
Defendant's Ex. D-1
Leroy J. Peterson, C.S.R.

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1971 JAN 18 AM 11:53
GLADYS M. CASPER
CLERK OF DISTRICT COURT

(a) has been (stolen) or (taken) or (embezzled) and illegally kept; and/or
(b) has been used as a means of accomplishing a public offense; and/or
(c) is being used with intent to commit a public offense; and/or
(d) other property relevant & material as evidence in a criminal prosecution; and/or
(e) held in violation of the laws of the State of Iowa in/on the following described person, premises, place, residence and/or automobile

(3)

That the facts and circumstances which lead me to believe that there is probable cause that a public offense committed and that the above described person, premises, place, residence and/or automobile should be searched is as follows:

(4) See attached affidavit pages 1 and 2 Exhibit A

2/3 x 3 - 52 - 223

WHEREFORE, the undersigned applies to a Magistrate of (5) Poweshiek County, Iowa, for a search warrant to be issued and the said person, premises, place, residence and/or automobile be searched for said property.

(6) C W Peters

Subscribed and sworn to before me and in my presence by said C. W. Peters this 11th day of November, 1970.

Edwin L. Parker Jr. J.P.
Magistrate

Instructions On Back

In and for Poweshiek County, Iowa

IN THE Justice of Peace COURT OF Edwin L. Lincoln
(District, Municipal, Justice) (Iowa, Grinnell, or Name of Township)

IN AND FOR Poweshiek COUNTY, IOWA

STATE OF IOWA
vs.
Ben Dodson person and residence of Homer Dodson's residence Located at 1516 7th Ave Grinnell, Poweshiek County, Iowa
(describe as on Information for Search Warrant)

SEARCH WARRANT

Defendant.

Atty's Ex
Defendant's Ex
Leroy J. Peterson, C.S.B.

THE STATE OF IOWA

TO ANY PEACE OFFICER OF Poweshiek COUNTY, IOWA

Proof having been this day made before me as provided by law that certain property is owned or possessed in violation of the laws of Iowa in said county, in the State of Iowa, in the place, building, and dependencies thereto described as follows: (Describe as set forth above.)

Person of Ben Dodson and residence of Homer Dodson Located at 1516 7th Ave Grinnell, Poweshiek County, Iowa

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1971 JAN 18 AM 11:50
ELAINE L. PETERSON
CLERK DISTRICT COURT

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and occupied by and in possession of the person above named as defendant and being satisfied that the foregoing recital relative to said property is probably true, now, therefore, you are commanded to make immediate search of the premises and person above described and search for:

Lysergic Acid (LSD)

and if said property or any part thereof be found you are commanded to bring said property forthwith before me at my office.

Dated at Grinnell, Iowa, this 7th day of November, 1970

Edwin L. Lincoln

JUDGE OF THE Justice of Peace Court
(District, Municipal, Justice)

COURT OF IOWA

RETURN OF SERVICE

STATE OF IOWA
Pottawattamie COUNTY } ss.

I, C. W. Peters, being a peace officer in and for Pottawattamie County, State of Iowa, hereby certify that the within search warrant came into my hands on the 22nd day of November, A. D. 1920., and on the 22nd day of November 1920, I executed said warrant by making a search of the premises therein described and found on the premises therein designated the following property, to-wit: (State kind and quantity):

Enumeration of articles appears in the ORDER (See next sheet)
on two pages

which said property I seized by virtue of the within warrant and which I now hold subject to further orders of the court.

I have further executed the within warrant by giving a signed inventory of the property taken to/left at [illegible] (officer give inventory)

I, the officer by whom the annexed warrant was executed, do certify that the above inventory contains a true and detailed account of the property taken by me on the warrant, and was made publicly.

Fees $
Services
Mileage
Cartage

C. W. Peters
Chief of Police, Council Bluffs, Iowa
Official Title

ORDER

Now, on this 22nd day of November, 1920, this matter comes to the attention of the Court, and the Court finds that proper Return of the within Search Warrant was filed with the undersigned issuing magistrate, as provided by law, on the 22nd day of November, 1920., and now, within forty-eight hours after said filing, it is the order of the Court that a hearing be held in this court [illegible] at 9 o'clock A. M., on the 4 day of December, 1920., the same being not less than five nor more than fifteen days after the filing of the Return of the within Search Warrant, and that at said time and place all persons who may be concerned may appear and show cause, if any they have, why property seized by virtue of the within Search Warrant should not be forfeited.

IT IS THE FURTHER ORDER OF THE COURT THAT NOTICE OF SAID HEARING BE GIVEN IN ACCORDANCE WITH SECTION 751.17 OF THE CODE OF IOWA, NOT LESS THAN THREE DAYS PRIOR TO THE DATE THEREOF.

Edwin Lewis
Justice of Peace
Title

— SUMMARY —

1. ..... (Name) (Address)
2. ..... (Name) (Address)
.....
.....
.....